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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-308

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Miscellaneous:

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QUESTION PRESENTED

Decedent transferred common stock in three corporations to an irrevocable trust reserving for his lifetime the right to vote such stock and to approve of the action of the corporate trustee before sale of the stock by the trustee. The right to vote the trusteed stock together with the vote of stock owned by the decedent gave him majority voting rights in each of the three corporations.

The question is whether under these circumstances

decedent retained for his life the right to designate the persons who would enjoy the income from the stock or the right to the possession or enjoyment or the right to the income from the stock within the meaning of Section 2036 (a) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The decedent during his lifetime created an irrevocable trust for the benefit of his children until age 35 (R. 16); naming a national banking corporation as trustee (R. 9, 16, 17). Until the youngest child reaches age 21, the trustee has sole discretion to make distributions of income or corpus to or for the benefit of a child or his issue with due regard to his individual need for education, care, maintenance and support (R. 14). After the youngest child has reached age 21 the trust is to be divided into separate trusts for each living or deceased child (R. 14). Each trust is to terminate when its beneficiary reaches age 35 (R. 16). The trustee is authorized to pay income and principal from the separate trusts if the beneficiary has an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of the beneficiary (R. 15).

The trust agreement further provides that all voting rights of any stocks not listed on a stock exchange shall be exercised by decedent and, after his death, his wife (R. 11).

There is included in the corpus of the trust unlisted voting stock in three corporations. The right to vote the stock transferred to the trust together with the vote of the stock owned by decedent gave him a majority vote in each of the three corporations. From the time of the creation of the trust until decedent's death, there were minor-

ity stockholders in each of the corporations (R. 30-32).

The corpus of the trust includes assets in addition to the unlisted stock. (R. 20-29).

No distributions of income or principal were made by the corporate trustee during decedent's lifetime. (R. 20).

SUMMARY OF ARGUMENT

I

The tax under Section 2036 (a) (2) is by its terms a tax on the "right *** to designate the persons who shall possess or enjoy the property or the income therefrom". Taxation is thus based upon the presence of a prerogative in the decedent to overtly choose those persons who will possess or enjoy the transferred property or its income. The shifting of economic benefit as an incidental consequence of the exercise of fiduciary responsibilities—whether created by the transfer or arising collaterally—does not constitute a "right *** to designate".

If the decedent in this case had the capacity to shift economic benefit by controlling the flow of dividend income to the trust, through his majority voting control, it was only as an incidental consequence of his fiduciary position as majority voting stockholder or corporation director. His relationship to the corporations and to all of their stockholders was one of trust. See *Pepper* v. *Litton*, 308 U.S. 295 (1939); *United States* v. *Gates*, 376 F.2d 65 (10th Cir. 1967) *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S.D. Ohio W.D. 1963); *State* v. *Witmore*, 126 Ohio St. 381 (1923). Any control he might have had over dividends (through his control of directors, themselves fiduciaries) was subject to the rule that directors are permitted to exercise business judgment as to the need to accumulate earnings, subject, however, to the general right of the stockholders to the profits of the business. Cf. *United States* v. *Gates*, supra; *Santarelli* v. *Katz*, 270 F.2d 762 (7th Cir. 1959); *Doherty* v. *Mutual Warehouse Company*, 245 F.2d 609 (5th Cir. 1957); *Wilberding* v. *Miller*, 90 Ohio St. 28, 42 (1914); *Arbuckle* v. *The Woolson Spice Co.*, 21 Ohio C.C.R. 356 (1901). A rule which operates upon standards at least

as objectively determinable as those limiting the power of a settlor-trustee to invade corpus "to suitably maintain [the life beneficiary] in as much comfort as she now enjoys", or to use corpus "for maintenance, welfare, comfort or happiness" of the income beneficiaries and for the "education" of the remaindermen, or to use income otherwise to be accumulated "to enable the beneficiary to maintain himself and his family, if any, in comfort and in accordance with the station in life to which he belongs", or to invade corpus for the "suitable support, education and maintenance" of any income beneficiary.[1]

Furthermore, where, as here, dividends are not fixed by contract, no shifting of dividend income is occasioned by a legitimate business decision to pay, or not to pay, dividends. Only in the event that dividend policy is based upon private interest or purpose—and, accordingly, in breach of the fiduciary obligations of directors — can shifting be held to occur.

Contrary to the case petitioner argues, *Byrum* does not present the circumstance of a right to shift economic benefit, said to be the basis for taxation under Section 2036(a) (2), and the Court of Appeals correctly decided this issue against petitioner's contention.

II

The *Byrum* trust is irrevocable. The trustee is a national banking corporation. Decedent retained no right to income or other pecuniary benefit from the trust or any reversionary interest (by the terms of the trust or operation of law) in the trust corpus. His reserved power to vote the trusteed corporate common stock is likened

1. Powers held to be subject to judicially enforceable standards in: *Ithaca Trust Company* v. *United States*, 279 U.S. 151 (1929); *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962); *Jennings* v. *Smith*, 161 F. 2d 74 (2nd Cir. 1947); *Estate of Ralph Budd*, 49 T.C. 468 (1968).

to any fiduciary administrative power and could have operated only indirectly, if at all, to his economic benefit.

The question under Section 2036 (a) (1) is not whether decedent retained incidents of ownership in the stock transferred, but whether he retained the right to the substantial present economic benefit of the stock. On this question, the Court of Appeals correctly held for respondent.

ARGUMENT

I. DECEDENT'S POWER UNDER TERMS OF TRUST TO VOTE UNLISTED STOCK DID NOT AMOUNT TO A RIGHT TO DESIGNATE WHO SHALL POSSESS OR ENJOY THE PROPERTY OR INCOME THEREFROM WITHIN THE MEANING OF SECTION 2036 (a) (2).

A. Decedent Did Not Retain A "Right" To Designate Within The Meaning of Section 2036 (a) (2)

Section 2036 (a) (2) taxes transfers under which the decedent has retained for his life "the right *** to designate the persons who shall possess or enjoy the property or the income therefrom". The language "right to designate", in its normal usage, comprehends an express or immediate power to choose.[2] Certainly it implies more

2. Pedrick, "Grantor Powers and Estate Taxation: The Ties That Bind", 54 Nw. U.L.R. 527,555 (1959), puts forth this proposition as follows: "An evaluation of this recent decision [*State Street Trust Co.* v. *United States*, 263 F. 2d 635 (1st Cir. 1959)] calls for a reexamination of the operative principles of sections 2036 and 2038 to determine their applicability to administrative powers. Both sections aim at purposeful changing of beneficial interests in a trust. Section 2036 deals with a right to designate the persons to enjoy the income and under this section a taxable power must be a power that enables a conscious permissive choice of ultimate income recipients. Section 2038 taxes powers to alter, amend, revoke or terminate and as construed by the courts reaches a power to change beneficial interests both as to identity of the beneficiary and the time of taking. But here again a power to so change interests assumes a right to make a knowing choice in beneficiaries or in timing". (The rule of *State Street Trust Co.* was later rejected in *Old Colony Trust Company* v. *United States*, 423 F. 2d 601 (1st Cir. 1970).

than an incidental consequence from the exercise of an unrelated fiduciary obligation.[3] Cf. *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1928); *United States* v. *Powell*, 307 F.2nd 821 (10th Cir. 1962); *Cushman* v. *Commissioner*, 153 F.2nd 510 (2nd Cir. 1946); *Estate of Willard V. King*, 37 T.C. 973 (1962).

Majority stockholders, as well as directors, stand in a fiduciary relationship to the corporation and to minority stockholders. See *Pepper* v. *Litton*, 308 U.S. 295 (1939); *United States* v. *Gates*, 376 F2nd 65 (10th Cir. 1967); *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S.D. Ohio W. D. 1963); *State* v. *Witmore*, 126 Ohio St. 381 (1923); *Thomas* v. *Matthews*, 94 Ohio St. 32 (1916). This relationship touches all aspects of corporation life, and directors may not defer payment of dividends for the purpose of defeating the rights of stockholders or a particular group of stockholders to the profits of the corporation. Cf. *United States* v. *Gates*, 376 F.2d 65 (10th Cir. 1967); *Oppenheimer* v. *Oppenheimer Printing Co.* 24 Ohio N.P. (n.s.) 483, 488 (1923); *Arbuckle* v. *The Woolson Spice Co.*, 21 Ohio C.C.R. 356 (1901).

The power of the decedent here was no greater than the power of the directors he was allegedly able to dominate. Under the circumstances of this case, directors could not, without breaching their trust, have adopted a dividend policy to serve the personal interest of the decedent if such policy conflicted with the interest of the corporation and the stockholders. From a practical consideration, it is unlikely that minority stockholders would permit

3. Treas. Reg. 20.2041, provides with regard to powers of appointment: "***The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercised in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment.***"

the manipulation of dividends to the prejudice of the stockholders.[4] Certainly, the circumstantial effect on trust income caused by the discharge of the fiduciary power of directors over dividend payment does not amount to a "right *** to designate" the persons who will possess or enjoy the trust property or its income.

In reality, it appears that decedent lacked even this incidental power to affect distributions from the trust.

The *Byrum* trust is a discretionary trust created for the benefit of the children of the decedent, continuing until the children reach age 35. It provides (Article VI, R. 14) that the trustee may, in its discretion, make distributions of income or principal to a child or children, before he or they have reached age 21, "with due regard to the individual needs, education, care, maintenance and support" of the child or children. It further provides (Article VI, R. 15) that after the youngest child has reached age 21, the trustee may make distributions of income or principal to or for the benefit of a child should such child "have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child". Thus the power to control the present economic enjoyment of the trust assets is lodged solely in the trustee, who is empowered to make distributions from either income or corpus. This disjunctive power in the trustee to distribute either corpus or income blunts even the incidentally consequential power to shift income that might otherwise exist through corporate dividend action.

In summary, Section 2036 (a) (2) is directed at transfers in which the transferor expressly reserves the power to choose the ultimate income beneficiaries or in which a conscious power to choose is held by the transferor as

4. It is also unlikely that the trustee could stand passively by if profits were being unwarrantedly withheld.

an incident of the transfer. *Byrum* fits neither of these statutory patterns.

B. Corporate Decisions To Pay Or Defer Dividends Did Not Cause A Shifting Of Economic Benefits

The Government rests its case for taxation under Section 2036 (a) (2) largely on *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948), an income tax case. It further seeks to foreclose argument as to its relevancy to the estate tax by asserting "it is no answer to say that *Sunnen,* an income tax case, is inapposite to the situation at hand".[5] There is considerable divergence, however, between the two taxes and the rules applicable to income tax are not necessarily applicable to estate tax. *Sunnen* is not precedent for the tax here.

Sunnen falls within the *Clifford, Horst* line of cases[6] which struck down income splitting through the devices of family trusts and transfers within an intimate family group. The Court held in *Sunnen* that the grantor of rights under licensing agreements with a corporation he dominated had retained the power—through his control of the corporation and retained ownership of the patents that produced the royalties—to procure cancellation of the contracts causing the income and property to revert to himself. Rejecting the argument that cancellation would be an actionable fraud upon the corporation, the Court reasoned that cancellation could also occur as the result of legitimate business decision and this possibility required the income from the licenses to be included in the taxpayer's gross income under the broad concept of gross income contained in Section 22 (a) of the Revenue Acts of 1936 and 1938. Petitioner argues that this same

5. Petitioner's Brief, page 13.

6. The early leading cases were *Helvering* v. *Clifford,* 309 U.S. 331 (1940); *Helvering* v. *Horst,* 311 U.S. 112 (1940); *Helvering* v. *Eubank,* 311 U.S. 122 (1940); *Commissioner* v. *Tower,* 327 U.S. 280 (1946).

kind of legitimate business option—to pay or defer dividends—was open here, with the same taxable result. The result does not follow, however, under the narrower reach of Section 2036 (a) (2).

The "legitimate business option" reasoning of *Commissioner* v. *Sunnen,* would only be applicable to *Bryum* if there were a fixed right to dividends or a determinable dividend rate. Absent some such measurable income, a legitimate business decision to pay or to defer dividends would not, under the facts of *Byrum,* cause a shifting of economic benefits. Any dividends declared were paid, unequivocally, to the trust. If not declared there was no income to shift and any economic benefit from retained earnings was reflected in the value of the stock and inured to all beneficiaries,[7] income and contingent remainder,[8] as their interests appeared.

It is only in the event that a board of directors acts out of private interest—as opposed to the corporation's legitimate business interest—that it can be said that there is, in any real sense, a shifting of economic benefits. And in such event directors will have breached their fiduciary duty to the corporation and to all of its stockholders.[9] A fiduciary duty which is measured by judicially enforceable standards at least as rigorous as the administrative standards imposed on trustees.

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7. On comparable facts, it was held in *Yeazel* v. *Coyle,* 68-1 USTC, ¶12,524, page 87,387: "***It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy in the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable***".

8. The children of decedent are given a testamentary power of appointment to their spouses or children upon their death before age 35 (Article II, R. 15; 16).

9. *Gottfried* v. *Gottfried,* 73 N.Y.S. 2d 692 (1947); *Dodge* v. *Ford Motor Co.,* 204 Mich. 459, 170 N.W. 668 (1919); *Arbuckle* v. *The Woolson Spice Co.,* 21 Ohio C.C.R. 356 (1901).

In *Yeazel* v. *Coyle,* the decedent transferred to herself as trustee shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the trust corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property". The government contended that the voting rights in the stock she owned together with her right to vote the trusteed stock gave her the same voting position she occupied before the transfer and the ability to control the corporation, including the distribution of dividends. Holding against the government, the court stated:

> "If the Governments' argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036 (a) is not that broad. ***"
>
> (68-1 U.S.T.C. page 87, 387).

The decision of the Court of Appeals below, and the position of respondent, is also supported by *Estate of Willard V. King,* 37 T.C. 973 (1962).

In *Estate of Willard V. King,* the settlor reserved for his life the power to direct the trustee in the management and investment of the property (stock in closely held corporations) in three trusts which provided that the income be paid to the settlor's three children with remainders over to designated beneficiaries. Against the government's argument that the settlor could cause investments to be made in wasting assets or non-income producing property, as he desired, and thereby control the flow of income to beneficiaries, the Tax Court held:

> "It is our conclusion that insofar as the management of the trust in the instant case was concerned, the

grantor had in effect made himself a fiduciary and that under the law of New York he was not at liberty to administer the trust for his own benefit or to ignore the rights of the beneficiaries, even though he no doubt would be permitted wide latitude in the exercise of his discretion as to the types of investments to be made."

(37 T.C. 980)

Petitioner's attempt to discount the *King* case on the basis that the court specifically found that the securities were at no time significant from the point of view of control of the particular companies involved is not persuasive. The settlor in *King* had immediate control over the income produced by the trust property through his investment power. The power sought to be taxed here, on the other hand, is an oblique power which affects trust income, if at all, only incidentally as the result of the discharge of corporate fiduciary duties. *King* is, a *fortiori*, dispositive of the issue here.

We submit that the government has failed to build a case for the estate tax on *Commissioner* v. *Sunnen* and that under the circumstances of *Byrum* the decedent did not retain the power to shift the economic benefits of the property transferred.

C. Decedent Held No More Than A Power Of Management

The power retained by the *Byrum* decedent was, at the very most, a power of management and within the shelter of the long established doctrine of the cases that powers of administration or management are not taxable powers under either Section 2036 or Section 2038. See *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1928); *United States* v. *Powell*, 307 F.2d 821 (10th Cir. 1962); *Estate of Ralph Budd*, 49 T.C. 468 (1968); *Estate of Marvin L. Pardee*, 49 T.C. 140 (1967); *Estate of Frederick M.*

Kasch, 30 T.C. 102 (1958); *Estate of Pierre Jay Wurts*, 19 T.C.M. 544 (1960); *Estate of Aline Peters Peters*, §64,167, P-H Memo T.C. (1960).

In *Reinecke* v. *Northern Trust Co.* the decedent in his lifetime established several trusts creating life interests in the income and reserving to himself, among other powers, the power to supervise reinvestment of trust funds, to require the trustee to execute proxies to his nominee to vote shares of stock held by the trustee and to control leases executed by the trustee. Holding that the transfers in trust were not in contemplation of or intended to take effect in possession or enjoyment at or after death under §401 (c) of the Internal Revenue Act of 1921 the Court reasoned:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax".
>
> (278 U.S. 346)

Reinecke cannot be disposed of, as petitioner would dispose of it, on the basis that it preceded the original enactment of what is now Section 2036. It is in principle determinative of the issue here.

Significantly, this Court had opportunity in both *Commissioner* v. *Estate of Church*, 335 U.S. 632 (1949) and *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949)

to overrule its *Reinecke* decision on the question of reserved powers of management but did not. Every decision since has followed the *Reinecke* rule that managerial powers are not taxable.[10]

In *United States* v. *Powell*, supra, the Court was asked to hold that the broad investment power of the trustees — one of whom was the settlor — required inclusion of the trust assets in the settlor's estate. The court decided against the government, however, stating:

> "We conclude the investment power given to the trustees by the trust instrument was subject to and limited by a judicially enforceable external and ascertainable standard and, hence, was no more than a management or administrative power, and that in exercising it, the settlor acted in a fiduciary capacity, as trustee, and not individually." (307 F. 2d 826)

The court also reasoned that in exercising a power to invade the corpus for the maintenance, welfare, comfort, education or happiness of the remainder beneficiaries, the trustees were subject to the supervision of the Kansas courts in the exercise of equity powers and, accordingly, that the trust contained an acertainable and judicially enforceable standard and was not, therefore, because of this power, includable in the gross estate.

Likewise, in *Estate of Marvin L. Pardee,* the Tax Court held that the power of the grantor-trustee to pay out or retain corpus and income on the basis of "other needs*** occasioned by emergency" was not an arbitrary power under Michigan Law requiring the inclusion of the trust in the taxable estate of the grantor.

In *Estate of Ralph Budd,* authority in the settlor as co-trustee to invade one of two trusts for the benefit of the

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10. In addition to the above cases, the following cases are in accord with *Reinecke* and contrary to the government's position here: *Ford's Estate* v. *Commissioner*, 53 T.C. 114 (1969); *Estate of James H. Graham*, 46 T.C. 415 (1966); *Estate of C. Dudley Wilson*, 13 T.C. 869 (1949); *Estate of George W. Hall*, 6 T.C. 933 (1946); *Estate of William F. Hofford*, 4 T.C. 790 (1945); *Estate of Henry S. Downe*, 2 T.C. 967 (1943); *Estate of Pierre Jay Wurts*, T.C. Memo, 1960-102.

income beneficiary in the event of "sickness, accident, misfortune, or other emergency" and to invade the second trust for the "suitable support, education and maintenance" of any income beneficiary was held to reflect external standards to which a court of equity would give effect.

The donor in *Estate of Aline Peters Peters,* elected, under an option given her by the trust instrument, to exercise in her sole discretion the management and investment of the trust during her lifetime. It was held that this reserved power of management did not require the inclusion of the trust property in the decedent's estate.

The trust in *Estate of Frederick M. Kasch,* provided that the income was to be accumulated but gave to the grantor-trustee power to invade corpus for proper care, support and medical attention "in their uncontrolled discretion". The Tax Court held this to be a non-taxable power under both Section 2036 and Section 2038.

Contrary to the petitioner's recurrent claim, the fiduciary standards of corporate management are not based upon inexact concepts of honesty and reasonableness but upon objective business factors which constantly figure in the judicial disposition of corporate disputes and transactions. They are at least as restrictive as standards of trust management and administration. Governed by such standards, the decedent in the case at bar had no right to designate the persons who would possess or enjoy the unlisted stock or the income therefrom within the accepted meaning of Section 2036 (a) (2). A reversal of the Court of Appeals in this case will be a reversal of *Reinecke* v. *Northern Trust Co.* and a repudiation of the rule that reserved powers of management are not taxable.

II. RESERVATION OF THE RIGHT TO VOTE STOCK TRANSFERRED TO AN IRREVOCABLE TRUST DID NOT CONSTITUTE RETENTION OF THE

POSSESSION OR ENJOYMENT OF THE STOCK WITHIN THE MEANING OF SECTION 2036 (a) (1)

Argument of petitioner on this issue assumes that the language "the possession or enjoyment of, or the right to the income from, the property", contained in Section 2036 (a) (1), has a single transactional purpose i.e. that it is intended to reach a transaction in which the transferor has retained either the right to the income from the property transferred or the right to possession or enjoyment of the property without right to income. There is reason to conclude, however, that "possession or enjoyment" was intended to have reference only to a power over non-income producing property.[11] And that the right to income from income producing property is solely determinative of the tax under the statute. If the right to income is pivotal, there is no tax in the case at bar because the decedent retained no right to the income from the stock, an income producing property. Assuming, however, *arguendo,* that under the statute, as it applies to income producing property, the right to income and the right to enjoyment are distinct and the retention of either incites the tax, the stock in question is still not taxable in decedent's estate here.

As stated and documented by petitioner in its brief, this Court has repeatedly held that the term "enjoyment" as used in the estate tax statutes is synonymous with substantial present economic benefit. The question, then, is whether this decedent retained the right to the substantial present economic benefit of the stock transferred.

The facts are that he did not retain title to the stock

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11. H. R. Rep. No. 1412 (Conf.), 81st Cong. 1st Sess., 5 (1949) "The income interests described in Section 2036 (a) ***include reserved rights to income from transferred property and rights to possess or enjoy non-income producing property." See also Covey "Section 2036—The New Problem Child of the Federal Estate Tax", 4 Tax Counselor's Quarterly 121, 129 (1960).

or the right to receive either cash or stock dividends from the stock. Nor did he reserve either the right to sell, pledge, assign or dispose of the stock, in any way, or the right to receive the proceeds from a sale or other disposition of the stock. All of these passed unequivocally from him. He did retain the right to vote the stock and to approve its sale during his lifetime.

If enjoyment is synonymous with present economic benefit, enjoyment of the stock transferred passed in this case to the trust beneficiaries. Cf. *Commissioner* v. *Estate of Church,* 335 U.S. 632 (1949); *Estate of McNichol* v. *Commissioner,* 265 F. 2d 667 (3rd Cir. 1959);[12] *Reish* v. *Commonwealth,* 106 Pa. 521 (1884).[13]

Notwithstanding, petitioner argues that decedent retained some of the rights of enjoyment and this, on the basis of *Commissioner* v. *Estate of Church,* was cause for the tax.

This argument is founded, in effect, on a bundle of rights theory or an incidents of ownership concept which has no validity as a test under Section 2036 (a) (1). It is logical to conclude that Congress would have used language similar to that employed in Section 2042.[14] had it intended the statute to operate on this kind of a test.

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12. In *McNichol,* the court held "***If, as was said in Commissioner v. Estate of Church, supra, 335 U.S. at page 645, 69 S. Ct. 322, the most valuable property attribute of stocks is their income, it is no less true that one of the most valuable incidents of income—producing real estate is the rent which it yields. He who receives the rent in fact enjoys the property". (265 F.2d 671)

13. *Reish* v. *Commonwealth,* is credited as the first reported case to consider the meaning of the term "possession or enjoyment". Note, 56 Yale L.J. 176 "Origin Of Phrase Intended To Take Effect in Possession Or Enjoyment At Or After Death". It was held in *Reish,* "One cannot be considered as in actual enjoyment of an estate who has no rights to the profits or incomes arising or accruing therefrom—.

14. The value of the gross estate shall include the value of all property—

*** *** ***

(2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable alone or in conjunction with any other person.***"

Furthermore, if petitioner's position here is correct, there would appear to be no need for the enactment of Section 2042, for any incident of ownership or property right in an insurance policy would constitute "possession or enjoyment" and be taxable under either Section 2036 or Section 2037.

The *Church* case does not support petitioner's position. The sweeping language of the *Church* opinion must be gauged against its judicial setting. *Church*, overruled the controversial *May* v. *Heiner*, 281 U.S. 238 (1930), to tax transfers, made before March 4, 1931, in which the transferor retained a life estate in the property transferred.[15] The Court did declare that to escape estate tax a settlor must be left with "no right* * *to enjoy the property" transferred, but further declared that "enjoyment" was synonymous with substantial present economic benefit.

Church ought not be considered as standing for more than it actually decided. The feature of the transfer that produced the tax in *Church* was the retention by the decedent of the income and profits from the property transferred. The significance of *Church* as precedent in the case at bar is found in the language "* * *[a] after such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title and no right to possess or to enjoy the property then or thereafter". (335 U.S. 645). The implication is clear that the court considered the right to receive the income and profits from the transferred property to be tantamount to possession and enjoyment of the property.

Speculation that decedent while not retaining any di-

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15. The conclusion is easily reached and has often been suggested that the predecessor of Section 2036 (a) (1) was solely intended to reach the *May* v. *Heiner* type transfer.

rect economic benefit from the stock transferred was in a position to perpetuate himself in office and fix his own compensation and receive liberal retirement and fringe benefits ought not be made the basis for tax. It assumes that the board of trustees would act in disregard of the best interests of the corporation and its stockholders and contrary to its trust. The same argument could be made if decedent had not retained the right to vote this stock. A similar argument was dismissed in *Commissioner v. Douglass' Estate*, 143 F. 2d 961, 963 (3rd Cir. 1944) as follows:

> "***The Commissioner's argument that these trustees would be likely to do what he [settlor] asked of them about assigning income for the support of a minor child departs from the 'practical' and 'realistic' approach we are asked, in the same argument, to take. We have no notion what the trustees would have done had such a request been made. It is apparent, from the terms of the instrument, that the settlor could not direct or control the matter, once the trust settlement had become effective."

This same kind of speculation was rejected in *Yeazel v. Coyle*, supra.

If the reach of Section 2036 (a) (1) is judged on its statutory language and not on the sweeping declarations by petitioner of its overriding purpose, it does not support taxation of the transfer in dispute. The question is not what the law should be in this area but what the law is and the Court of Appeals below correctly decided the question before it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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